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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 01 2009
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts and as a member of the professions holding an advanced degree. The petitioner seeks employment as a graphic artist and art director for Graphic & Creativity LLC, a company apparently owned by the petitioner and her spouse. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner failed to show that she qualifies for classification as an alien of exceptional ability in the arts or as a member of the professions holding an advanced degree, or that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel indicates that a brief will be forthcoming within 30 days. To date, six months after the filing of the appeal, the record contains no further substantive submission from the petitioner. We therefore consider the record to be complete as it now stands.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first issue under consideration is whether the petitioner qualifies for classification under section 203(b)(2) of the Act, either as a member of the professions holding an advanced degree, or as an alien of exceptional ability in the arts. The regulation at 8 C.F.R. § 204.5(k)(2) provides the following definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
>
> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.
>
> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

PROFESSIONAL HOLDING AN ADVANCED DEGREE

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that, to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The petitioner's initial submission included an uncertified ETA Form 9089, Application for Permanent Employment Certification. The petitioner signed the form under penalty of perjury. In Part H of this form, the petitioner indicated that her position requires, at a minimum, a bachelor's degree and five years of experience. Asked "Is there an alternate combination of education and experience that is acceptable," the petitioner answered "No." In Part I of the form, the petitioner indicated that the position is "a **professional occupation** . . . for which a bachelor's degree (or equivalent) is normally required" (emphasis in original). Under "Employer's name," the petitioner listed her own name. The petitioner did not specify how the lack of a bachelor's degree and five years of experience would prevent her from working as a graphic artist.

On ETA Form 9089, under "Occupation Title," the petitioner wrote "Graphic Designer." Asked "Are the job opportunity's requirements normal for the occupation," the petitioner answered "Yes." According to O*NET (the Occupational Information Network), barely half of graphic designers (55%)

between the ages of 25 and 44 hold bachelor's degrees.[1] Therefore, we cannot conclude that the occupation of graphic designer is a professional occupation requiring at least a bachelor's degree. The petitioner cannot change this simply by declaring that her work requires a bachelor's degree.

In a statement accompanying the initial submission, counsel stated that the petitioner "holds a bachelor's degree in graphic arts," but neither counsel nor the petitioner (on ETA Form 9089) specified where the petitioner earned that claimed degree. The petitioner submitted a copy of a certificate from the Toulouse-Lautrec Institute of Communications and Design, Lima, Peru, indicating that the petitioner studied there from autumn 1994 to summer 1997, and "obtained the Title . . . of Technical Professional in GRAPHIC DESIGN" (emphasis in original). The petitioner submitted no credential evaluation or other documentation to establish that this three-year certificate is equivalent to a United States bachelor's degree (which is typically a four-year degree).

On August 22, 2008, the director issued a request for evidence (RFE). In the RFE, the director stated that the petitioner's three-year certificate is not equivalent to a four-year United States bachelor's degree. In response, counsel stated: "We are . . . submitting an expert evaluation that the degree is equivalent to a U.S. Bachelor's degree."

The petitioner actually submitted two evaluations. The first was prepared by [redacted] of Career Consulting International.[2] [redacted] stated that the petitioner's "Education is Equivalent to US Bachelor of Fine Art Degree," but did not explain how she reached this conclusion except to state that the "Instituto de Educacion Superior Tecnologico Privado Toulouse Lautrec requires graduation from high school."

The second, more detailed evaluation, is from [redacted] President of Marquess Educational Consultants, Ltd. and the European-American University.[3] He stated that his evaluation "is based on informed opinion as an expert in the field of international credentials"; he cited no particular sources with specific regard to the institution where the petitioner studied, or to education in Peru. Most of the lengthy evaluation discusses the general proposition that a three-year degree can be equivalent to a four-year United States bachelor's degree.

In his evaluation concluding that the beneficiary's three-year degree following 12 years of primary and secondary education is equivalent to 120 credits and a four-year degree in the United States,

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[1] Source: http://online.onetcenter.org/link/details/27-1024.00#Education (visited June 30, 2009; copy added to record).

[2] In her evaluation, [redacted] indicated that she has "a Masters degree from the Institute of Transpersonal Psychology and a doctorate from French Ecole Supérieure Universitaire Robert de Sorbon," but did not indicate the field in which she obtained her doctorate. According to its website, http://www.sorbon.fr/index1.html, Ecole Supérieure Robert de Sorbon awards degrees based on past experience rather than academic study. (Site visited June 30, 2009; copy added to record.) While [redacted] indicates that she is a member of the American Evaluation Association (AEA), the Association of International Educators (NAFSA) and the European Association for International Education (EAIE), the record does not show that any of these organizations require proof of expertise as a condition of membership. The payment of dues does not confer any expertise.

[3] Like [redacted] claimed a doctoral degree ("in Humanities") from the Ecole Supérieure Robert de Sorbon, which awards degrees on the basis of experience rather than academic study.

[redacted] relied on *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 (D. Or. 2006). The judge in that case, however, found that U.S. Citizenship and Immigration Services (USCIS) is entitled to deference in interpreting its own regulatory definition of advanced degree. *Id.* at 11.

Even if we were to accept all of general claims (which we do not), it would not compel a finding that *every* three-year degree is equivalent to a four-year United States bachelor's degree. (Several of the quoted sources in the evaluation itself indicate that such degrees are considered "on a case-by-case basis," which by definition rules out automatic acceptance of such degrees.) In the small section of the evaluation devoted specifically to the petitioner's education, the evaluator stated that the petitioner "has completed a three year full-time program . . . that requires high school graduation . . . for entry." This establishes that the petitioner holds a postsecondary degree, but not every postsecondary degree is at least equivalent to a bachelor's degree (an associate's degree, for instance, is below a bachelor's degree).

The evaluator also asserted that the petitioner's degree "is not merely an academic award, it is a license to practice her profession . . . It is thus in every respect functionally equivalent to a bachelor's degree in graphic design." This argument rests on the presumption that graphic design is a profession requiring at least a bachelor's degree. The petitioner has submitted nothing to establish that a bachelor's degree is, in fact, a minimum condition for employment as a graphic designer. We reiterate here that O*NET, a source affiliated with the Bureau of Labor Statistics and considerably more official and authoritative than [redacted], indicates that 45% of United States graphic designers between the ages of 25 and 44 do not hold bachelor's degrees. Given this information, we cannot reasonably find that graphic design is a "profession" requiring at least a bachelor's degree. This is doubly so in a situation where the petitioner is essentially self-employed, and there is no known mechanism by which the lack of a bachelor's degree would prevent a self-employed graphic designer from working in the United States.

The director denied the petition on November 10, 2008, stating "the petitioner does not hold a United States baccalaureate degree or a foreign equivalent degree. Hence, the petitioner does not qualify as a member of the professions holding an advanced degree."

On appeal, counsel asserts that the director failed to give due weight to the "credential evaluation report and expert opinion" submitted previously. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Commr. 1988); *see also Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). For reasons already explained, we find the opinions proffered by Sheila Danzig and John Kersey to be questionable.

Also, whatever the situation with the petitioner's degree, the petitioner has submitted nothing to establish that graphic design is a profession (requiring at least a bachelor's degree) in the United States. An alien in a non-professional field cannot qualify as a member of the professions holding an advanced degree, no matter what that alien's academic achievements.

We agree with the director's finding that the petitioner has not established that she is eligible for classification as a member of the professions holding an advanced degree or its defined equivalent.

EXCEPTIONAL ABILITY

Counsel has also claimed that the petitioner qualifies for classification as an alien of exceptional ability in the arts. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The petitioner's initial submission did not address the issue of exceptional ability, as the focus was on the advanced degree claim. In the RFE, the director requested "[e]vidence that the self-petitioner has . . . exceptional ability . . . in the field of Graphic Designing. See 8 CFR Section 204.5(k)(3)(ii)." In response, counsel stated that the petitioner "has the equivalent of a four year bachelor's degree in addition to five years of experience in the field of graphic design. Also, based on the fact that [the petitioner] received the PADIS Award in Peru, that she is an individual of exceptional ability." We will discuss the award further below.

The director, in denying the petition, stated that the petitioner had addressed only two of the six regulatory criteria at 8 C.F.R. § 204.5(k)(3)(ii), and therefore "has not demonstrated exceptional ability." On appeal, counsel states that the petitioner "submitted evidence in four catergories [sic] to establish that she is an alien of exceptional ability." We will address this claim here.

We note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below. Qualifications possessed by all or most workers in a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." For example, every qualified physician has a college degree and a license or certification, but it defies logic to claim that every physician therefore shows "exceptional" traits.

The petitioner claims to have met the following four regulatory criteria:

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.* 8 C.F.R. § 204.5(k)(3)(ii)(A)

We have already discussed, at some length, the petitioner's three-year certificate from the Toulouse-Lautrec Institute. We have also, however, shown that 55% of graphic artists in the United States hold bachelor's degrees. Even if we were to grant that the petitioner's certificate is equivalent to a bachelor's degree, such a degree is not a level of education significantly above that ordinarily encountered among graphic designers. A bachelor's degree is not a minimum requirement for employment as a graphic designer, but "above the minimum" is not the same thing as "significantly above that ordinarily encountered." Because the majority of graphic designers hold bachelor's degrees, a bachelor's degree is "ordinarily encountered" in the field of graphic design.

The petitioner has not satisfied this criterion.

> *Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.* 8 C.F.R. § 204.5(k)(3)(ii)(B)

Counsel, on appeal, claims that the petitioner "submitted letters from former employers, which totalled 10 years experience." Counsel does not elaborate, and we cannot find such evidence in the record. Section K of ETA Form 9089, "Alien Work Experience," begins with the instruction to "[l]ist all jobs the alien has held during the past 3 years. Also list any other experience that qualifies the alien for the job opportunity." The petitioner and counsel (who prepared the form) left this section blank.

On Form G-325A, Biographic Information (submitted with the petitioner's Form I-485 adjustment application), the petitioner claimed to have worked for "Estudio A." from October 2000 to October 2001, and for [redacted] from October 2001 to January 2002. The petitioner stated that she has been self-employed since 2002.

of Studioa indicated that the petitioner "provided services to our company as a Graphic Designer for a period of five months in the year 2002." [redacted] of

Diseño & Estrategia stated that the petitioner "worked under my supervision during a period of five years as Director of Art." [redacted] did not specify the dates of this five year period, except to state that the company won an award in 2003 because of the petitioner's work. The described periods of employment conflict with the dates provided by the petitioner on Form G-325A. In terms of the petitioner's self-employment, the petitioner has submitted letters from one client, [redacted] who met the petitioner in 2006. This evidence is not sufficient to establish ten years of full-time experience as a graphic artist.

> *A license to practice the profession or certification for a particular profession or occupation.* 8 C.F.R. § 204.5(k)(3)(ii)(C)

Counsel states that the petitioner "received [a] professional certificate" over and above her three-year diploma, but the record appears to contain no such document. One of the petitioner's evaluators had previously claimed that the petitioner's "certificate" is the same as her "degree" from the Toulouse-Lautrec Institute, rather than a separate credential.

The petitioner has not satisfied this criterion.

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.* 8 C.F.R. § 204.5(k)(3)(ii)(F)

The initial submission contains a translated certificate showing that the petitioner was a "First Finalist" in the 2003 PADIS design contest, held biannually by the Toulouse-Lautrec Institute. This prize appears to constitute qualifying recognition, thereby satisfying this criterion. Because the petitioner has not satisfied any other criteria at 8 C.F.R. § 204.5(k)(3)(ii), however, we agree with the director's finding that the petitioner has not shown that she qualifies as an alien of exceptional ability in the arts.

NATIONAL INTEREST WAIVER

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Because the petitioner has not demonstrated eligibility for the underlying immigrant classification, she cannot qualify for the national interest waiver. In the interest of thoroughness, however, we will consider the petitioner's waiver claim here.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The initial submission included the following assertions from counsel:

> [The petitioner's] unique skills have contributed to the advancement of the education of young aspiring soccer players. The advancements that [the petitioner] has contributed are significant. [The petitioner] is the illustrator for the book series "The Magic Soccer Ball." These books are published nationally, and sold by large companies such as Border's [*sic*] Books and Amazon Book company [*sic*]. . . . The series would not be as successful without the creative illustrations provided in the book.

The record (which includes copies of books in *The Magic Soccer Ball* series) shows that the petitioner is not "the illustrator" of those books, but rather a co-illustrator with her spouse. Counsel did not explain why the petitioner's work on children's athletic instructional books is so significant as to qualify her for the national interest waiver. It may well be that the design of the books' illustrations is integral to the overall impact of the series, but the petitioner has not established the impact of that series. The books' authors ([redacted] and [redacted]) self-published the books through AuthorHouse and Xlibris. Their availability through national retailers – particularly online sellers such as Amazon – does not imply that the books enjoy significant sales. The books are clearly intended to teach soccer skills to

young children, but this does not mean that the books have had, or will have, a significant influence in this area.

In the August 2008 RFE, the director asked for evidence to show that the petitioner's work has had sufficient impact to warrant a national interest waiver, and to show that the petitioner's "talent will serve the national interest of the United States to a substantially greater extent than other Graphic Artist/Art Director[s] in the field."

In response, counsel stated that reviews of the *Magic Soccer Ball* books "show that [the petitioner's] illustrations not only enhance the book, but assist in educating young people on the rules of soccer. The reviews also show the books . . . have had a significant impact on the American public at large and people have greatly benefited from the 'Magic Soccer Ball' series."

Magic Soccer Ball author [redacted] stated that the petitioner "is a hard-working person who invariably understands exactly what it takes to succeed." [redacted] clearly holds a high opinion of the petitioner's skill and character, but he did not state that the petitioner's continued work on the book series is a matter of national interest.

The petitioner submitted printouts of several World Wide Web pages discussing the *Magic Soccer Ball* books. Several of these are not "reviews" at all. An article from the *Ann Arbor* (Michigan) *News* does not mention the petitioner. The article, "Coach's book teaches kids soccer basics," briefly profiled the books' authors (who reside in the Ann Arbor area) and discussed motivation to write instructional soccer books for children.

Other pages, from online retailers, show product descriptions that appear to be the authors' own promotional blurbs for the books. Some retailers' pages also include "Customer Reviews." These reviews show that customers have been happy with the books, but this does not establish the extent of the books' influence. Many of the reviews do not mention the illustrations at all.

The remaining submission is a review by [redacted] of the book *The Magic Soccer Ball: Receiving and Trapping*. The top of the page shows an insignia that reads "Clarion – Review For Fee Service," indicating that the book's creators commissioned and paid for the review. There is no indication in the record that the book has drawn the attention of professional book reviewers who have not been specifically hired for the purpose. Even then, the Clarion review does not mention the petitioner, and there is no discussion of the illustrations apart from incidental references to "diagrams" and "a visible banner in the soccer field."

None of the materials submitted support counsel's claim that "[t]he reviews . . . show the books . . . have had a significant impact on the American public at large and people have greatly benefited from the 'Magic Soccer Ball' series." Even if the petitioner had shown that the series has been massively influential in children's sports education, the materials described above focus on the text of the books rather than the illustrations.

In denying the petition, the director noted the petitioner's receipt of the 2003 PADIS award, but found that this honor "does not demonstrate influence on the field of endeavor as a whole." The director also found that the petitioner had not established the influence of the *Magic Soccer Ball* books, and that the materials discussing those books showed "positive feed back about the authors of the book, not the illustrators." The director found that the petitioner had not established significant impact on the field of graphic design that would warrant a national interest waiver.

On appeal, counsel states: "Evidence was proffered to show that [the petitioner] has influenced the area of graphic design through the 'Magic Soccer Ball' series." Counsel does not explain the nature of this evidence, except to observe that some of the customer reviews complimented the illustrations as well as the text of the books. Customers' enjoyment of book illustrations is not influence on the field of graphic design.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to perform the duties of a particular job in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a particular field of endeavor, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.